

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs November 6, 2007 at Jackson

STATE OF TENNESSEE v. MICHAEL W. GRAVES

Appeal from the Criminal Court for Sumner County
No. 393-2005 Jane W. Wheatcraft, Judge

No. M2006-01469-CCA-R3-CD - Filed December 5, 2007

The State appeals the trial court's suppression of evidence pursuant to Rule 3(c) of the Tennessee Rules of Appellate Procedure, allowing an appeal when the substantive effect of a ruling by the trial court is dismissal of an indictment. The defendant, Michael W. Graves, moved to suppress evidence seized during a search of his house. The trial judge concluded that the evidence had been illegally seized and granted the motion to suppress. We affirm the judgment of the trial court.

Tenn. R. App. P. 3; Judgment of the Criminal Court Affirmed

JAMES CURWOOD WITT, JR., J., delivered the opinion of the court, in which THOMAS T. WOODALL and J.C. McLIN, JJ., joined.

Robert E. Cooper, Jr., Attorney General and Reporter; Benjamin A. Ball, Assistant Attorney General; and Dee David Gay, Assistant District Attorney General, for the appellant, State of Tennessee.

Edgar (Eddie) Taylor III, Hartsville, Tennessee, for the appellee, Michael W. Graves.

OPINION

On April 28, 2005, police officers searched the defendant's Sumner County residence pursuant to a search warrant. The search revealed the presence of drugs and drug paraphernalia. The defendant was charged with the manufacture of 26 or more grams of methamphetamine, *see* T.C.A. § 39-17-417 (1), a Class B felony, possession with intent to sell or deliver 26 or more grams of methamphetamine, *see id.* § 39-17-417 (4), a Class B felony; possession of pseudoephedrine with intent to use in the manufacture of methamphetamine, *see id.* § 39-17-434 (a), a Class E felony; and possession with intent to use drug paraphernalia to manufacture, process, prepare, store, contain or conceal a controlled substance, *see id.* § 39-17-425 (a)(1), a Class A misdemeanor.

On May 9, 2006, the defendant filed a pretrial motion to suppress the evidence obtained as a result of the search warrant, arguing that the affidavit was insufficient because it failed to establish probable cause. The affidavit underlying the search warrant was filed by Michael

McLerran, a Sumner County Deputy Sheriff, narcotics investigator for the 18th Judicial District Drug Task Force, and member of the Drug Enforcement Agency Task Force. The affidavit reflects that the affiant believed the defendant was in possession of substances used to manufacture methamphetamine. The affiant's belief was supported by information obtained from numerous individuals as he conducted an ongoing investigation into the methamphetamine trade in Sumner County over a three year period. These individuals provided the following information that was presented in the affidavit:

3. On June 7th, 2004 your affiant was contacted by Det. Forrest of the Sumner County Sheriffs Dept. She stated that she had a subject by the name of Anthony Driver in her office that wanted to talk to your affiant about Michael W. Graves. Your affiant interviewed Mr. Driver and he stated that he would go with Michael W. Graves to Indiana and pick up app. 5,000 pseudoephedrine which is a key precursor for the manufacture of methamphetamine, from one Kenny Perry who is from Sumner County Mr. Driver stated that most of the methamphetamine was going to the Brother[s] Of Iron motorcycle club and that they would pick up 3 three to 4 four ounces of methamphetamine at a time. Anthony Driver stated that Michael W. Graves keeps the methamphetamine cooking equipment in a storage shed behind Michael Grave's [sic] trailer.
4. On or around July 13th or 14th, 2004 you're [sic] affiant was contacted by State Probation Officer Terry Holbrook, he advised that Rene Jagers came into his office and gave information on Michael W. Graves. On August 24th, 2004 your affiant conducted an interview of Ms. Jagers and was advised of the following. Michael W. Graves was cooking methamphetamine and is associated with Matthew Leduc and Kerry Wilson Ms. Jagers stated that Michael W. Graves is supplying the methamphetamine to the Brothers of Iron Motorcycle club.
5. On August 1st, 2004 your affiant was contacted by Dept. Micky Jones of the Sumner County Sheriffs Dept. He stated that a concerned citizen had called him The citizen was contacted by your affiant and he/she stated that he/she has family living in the area of Rockhouse Hollow Road and rumors in the neighborhood was [sic] that Michael Graves was making methamphetamine at his home. The citizen stated that

there was large amounts of traffic in and out of the residence at all hours of the day and night.

6. On August 30th, 2004 your affiant received an anonymous call stating [that] her son who is 11 years old had told her that Michael Graves who lives at 250 B Rock house Hollow Road was cooking methamphetamine in the back of his house.
7. On September 16th, 2004 your affiant received a call from private investigator David Dardille. He advised that he had been working an investigation in the Westmoreland, Tennessee area. Mr. Dardille stated during this investigation he had received information that Michael Graves was cooking methamphetamine[.]
8. On October 10th, 2004 your affiant was contacted by the Westmoreland Police Dept. Matthew Leduc was involved in a traffic accident and was in possession of 798 pseudoephedrine. Your affiant conducted an interview of Mr. Leduc Mr. Leduc stated that Michael Graves was cooking methamphetamine with Michael Helson at his residence on Rock house Hollow Road. Mr. Leduc stated that Michael Graves had a large stash of weapons at his residence and possible booby traps.
9. On October 13th, 2004 Dept. [sic] Brian Denning of the Sumner County Sheriffs Dept. went to 250 B Rock house Hollow Road to assist Westmoreland Police Dept on a missing person call. Once arriving at the residence Dept. [sic] Denning advised that Matthew Leduc was at the residence and that there was knew [sic] cans of Coleman fuel sitting on [the] porch. Coleman fuel is used to extract the pseudo from the effedrine.
10. On April 13th, 2005 your affiant conducted an interview of Robert Cross at the Sumner County Jail . . . Mr. Cross stated that Michael Graves was cooking methamphetamine at his residence in a shed behind the home and has [sic] been for some time. Mr. Cross stated that he has [sic] observed liquids in Mr. Graves [sic] residence believed to be pill soaks, (or pseudoephedrine in the process of extracting the pseudo from the effedrine). Mr. Cross stated that Michael Graves was in possession of automatic weapons and that Matt Leduc had

went [sic] to Indiana and picked up pseudoephedrine for Michael Graves.

11. On April 21st, 2005 your affiant was contacted by the Westmoreland Police Dept. [by] a concerned citizen with intimate knowledge of Michael Graves [sic] residence and who had been inside Michael Graves [sic] residence a few days prior to April 21st, 2005 had come into the Police Dept. with the following information. The citizen stated that Michael Graves cooks methamphetamine a couple of times a week and keep [sic] pill soaks going in a cooler on the back porch Michael has cameras on the driveway and a monitor. Michael has a bulletproof vest and automatic weapons that he had made.

On June 30, 2006, the trial court held a suppression hearing. The defendant argued that the information in the affidavit came from concerned citizens and “members of the criminal element” without offering anything to support their bases of knowledge or veracity. The trial judge found that the search warrant was not supported by probable cause and granted the motion to suppress, describing the information in the affidavit as “speculation, rumor, but nothing concrete.”

The State filed a timely appeal on July 3, 2006.

When challenged evidence is seized pursuant to a search warrant, the burden rests upon the aggrieved party to prove a constitutional violation by a preponderance of the evidence. *State v. Henning*, 975 S.W.2d 290, 298 (Tenn. 1998). On appellate review of a motion to suppress evidence, the trial court’s decision will be upheld unless the evidence preponderates against the court’s findings. *State v. Odom*, 928 S.W.2d 18, 23 (Tenn. 1996). Questions of credibility of witnesses are resolved by the trial court, not the appellate court. *Id.* The party who prevailed in the trial court enjoys on appeal the strongest legitimate view of the evidence and all reasonable, legitimate inferences that may be drawn from the evidence. *Id.* On the other hand, the application of the law to the facts found by the trial court is a question of law that this court reviews de novo. *State v. Crutcher*, 989 S.W.2d 295, 299 (Tenn. 1999).

On a constitutional level, the Fourth Amendment to the United States Constitution forbids unreasonable searches and seizures and the issuance of warrants except upon probable cause, “supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.” U.S. const. amend. IV. The Tennessee Constitution also forbids unreasonable searches and seizures and proscribes “general warrants, whereby an officer may be commanded to search suspected places, without evidence of the fact committed, or to seize any person or persons not named, whose offences are not particularly described and supported by evidence.” Tenn. const. art. I, § 7. Of course, the federal provision is applicable to state action.

Mapp v. Ohio, 367 U.S. 643, 660 (1961).

A search warrant is “an order in writing in the name of the state, signed by a magistrate, directed to the sheriff, any constable, or any peace officer of the county, commanding him to search for personal property, and bring it before the magistrate.” T.C.A. § 40-6-101 (2003). In Tennessee, a finding of probable cause supporting issuance of a search warrant must be based upon evidence included in a written, sworn affidavit. *Id.* § 40-6-104 (2003); Tenn. R. Crim. P. 41(c); *State v. Henning*, 975 S.W.2d at 295-96 (Tenn. 1998). The affidavit must set forth “facts upon which a neutral and detached magistrate, reading the affidavit in a common sense and practical manner, can find probable cause.” *Henning*, 975 S.W.2d at 294. This requirement of the magistrate’s independent judgment means that the affidavit must contain more than merely conclusory allegations by the affiant; “recital of some of the underlying circumstances in the affidavit is essential if the magistrate is to perform his detached function and not serve merely as a rubber stamp for the police.” *United States v. Ventresca*, 380 U.S. 102, 108-09 (1965).

Tennessee law distinguishes between “citizen informants” and “criminal informants.” Special rules fulfill the need for a detached and neutral review when probable cause is supplied by an informant who is an informant drawn from the “criminal milieu.” In such situations, Tennessee requires the application of the two-pronged *Aguilar-Spinelli* test. *State v. Cauley*, 863 S.W.2d 411, 417 (Tenn. 1993); *State v. Jacumin*, 778 S.W.2d 430, 431 (Tenn. 1989); *see Spinelli v. United States*, 393 U.S. 410 (1969); *Aguilar v. Texas*, 378 U.S. 108 (1964). The two-prong test must be used to assure (1) the basis of the informant’s knowledge and (2) the credibility of the informant or the reliability of the information. *Jacumin*, 778 S.W.2d at 432. Finally, we note that “independent police corroboration [can] make up deficiencies in either prong” of the *Aguilar-Spinelli* test. *See State v. Moon*, 841 S.W.2d 336, 340 (Tenn. Crim. App. 1992).

Information provided by an ordinary citizen is presumed to be reliable, and the affidavit need not establish the veracity prong of *Aguilar-Spinelli*. *See State v. Melson*, 638 S.W.2d 342, 354-55 (Tenn. 1982). The rationale for the different tests is that information supplied by the traditional criminal informant carries with it a “certain impression of unreliability” as it is often “given in exchange for some concession, payment, or simply out of revenge against the subject,” whereas the ordinary citizen informant who has witnessed a crime “acts with an intent to aid the police in law enforcement because of his concern for society or for his own safety” and “does not expect any gain or concession in exchange for his information.” *State v. Stevens*, 989 S.W.2d 290, 294 (Tenn. 1999) (internal quotation marks and citations omitted). Mere conclusory allegations that the informant was a concerned citizen, sought no payment for the information, or acted out of a sense of civic duty are insufficient to establish that the individual qualifies as a citizen informant. *Id.* Instead, the affidavit must contain particularized information as to how the citizen “‘happened to come upon’” the information, particularly when the information provided, such as the location of narcotics, is more likely to be gained by someone from the criminal milieu than by “‘a law-abiding individual.’” *Id.* (quoting 2 Wayne R. LaFare, *Search and Seizure* § 3.4 (a) (3d ed. 1996)).

Furthermore, information provided by a citizen-informant who is known to the affiant is presumptively reliable. *Id.* at 293. The reliability of the information of a citizen-informant whose identity is not disclosed is to be determined from the circumstances and the affidavit in its entirety. *Melson*, 638 S.W.2d at 356. For reliability to be presumed, information about the citizen's status or his or her relationship to the events or persons involved must be present. *Id.* at 354-56.

“[T]he name of the source is not required, as a matter of law, to be disclosed in the affidavit. The reliability of the source and the information must be judged from all of the circumstances and from the entirety of the affidavit. The name of the source is only one factor to be considered.”

Id. at 356.

In the case at hand, several of the informants mentioned in the affidavit are in the “criminal milieu.” Anthony Driver was traveling with the defendant to purchase stolen pseudoephedrine in Indiana. Rene Jagers made her initial contact with Mr. McLerran through her probation officer. Matthew Leduc provided information after being caught in possession of 798 pseudoephedrine. Robert Cross gave his statements while in the Sumner County Jail. The affiant spoke with these individuals only after being contacted by a probation officer or an individual in the Sumner County Sheriff's Department. The affidavit failed to establish the credibility of any of these individuals from the criminal milieu. Furthermore, save for the personal knowledge implied by the statements of Anthony Driver and Robert Cross, no information was provided to establish the bases of knowledge of their claims. In short, none of these statements meet the validity requirement of *Jacumin*.

Although an affidavit generally need not establish veracity for a citizen informant, it still must show a basis of knowledge of the citizen's claims. *Melson*, 638 S.W.2d at 354-55. The August 1, 2004 contact with a “concerned citizen” reporting “rumors in the neighborhood” does not meet this test. Also, the reliability of the information of this citizen-informant whose identity is not disclosed is to be determined from the circumstances and the affidavit in its entirety. *Id.* at 356. This “concerned citizen” was admittedly reporting rumors, and nothing in the affidavit supports this individual's status as merely a “concerned citizen” with no ulterior motive.

The information about the August 30, 2004 call reporting an 11-year-old boy's claims is similarly lacking. Again, there is no information showing the basis of knowledge of the caller or the child. There is no suggestion that the adult confirmed the statement by the child, or any details on how an 11-year-old would be able to identify someone cooking methamphetamine. Also, no additional information in the affidavit supports the “concerned citizen's” disinterest. This tip falls short of both the reliability or veracity prong and the basis of knowledge requirement.

The September 16, 2004 call from private investigator David Dardille, who claimed to have heard that the defendant was cooking methamphetamine, is presumptively reliable as a first hand statement by a known citizen. However, the affidavit provides nothing in support of a basis

of knowledge on his part. Mr. Dardille states that he “received information that Michael Graves was cooking methamphetamine,” but the affidavit provides no information to support his statement. We are not told where the information came from or what reason he has to believe it. As such, Mr. Dardille’s statement cannot satisfy the basis of knowledge prong.

The October 13, 2004 observations of Deputy Brian Denning provide first hand knowledge and visual evidence; however, Deputy Denning merely saw cans of Coleman fuel on the front porch. Although Coleman fuel may be used in the manufacture of methamphetamine, it also has legitimate uses. Although Deputy Denning’s statement contains a basis of knowledge, the sight of Coleman fuel on a porch does not alone justify the issuance of the search warrant.

Finally, the statement by “a concerned citizen with intimate knowledge of Michael Graves’ residence and who had been inside Michael Graves’ residence a few days prior to April 21st, 2005” failed to mention that the “concerned citizen” personally observed the illegal activities. The statement, “The citizen stated that Michael Graves cooks methamphetamine a couple of times a week and keep [sic] pill soaks going in a cooler on the back porch,” provided no information indicating that the informant saw anything first hand. As the trial court noted, “He [the informant] is just saying he cooks it, but he didn’t say, I saw him cooking it. He didn’t say, I saw these pill soaks . . . it’s not specific.” Although the State is correct in observing that statements from a confidential citizen informant are presumptively reliable, the reliability of the information of a citizen-informant whose identity is not disclosed is to be determined from the circumstances and the affidavit in its entirety. *Melson*, 638 S.W.2d at 356. The affidavit offers no particularized information as to how this concerned citizen came upon his or her information. Furthermore, the affidavit contains only a conclusory statement that the informant is a concerned citizen and provided no details as to how the informant obtained their “intimate knowledge of Michael Graves [sic] residence.” Without a more definitive statement of basis of knowledge, the citizen’s statement is lacking.

Thus, we hold that all the citizen statements in the affidavit were lacking in bases of knowledge, save for the visual sighting of Coleman fuel by Deputy Denning. Accordingly, the affidavit of Officer McLerran did not establish probable cause for the search of the defendant’s property. Finding no merit to the State’s claims, the judgment of the trial court is affirmed. Because the State availed itself of a rightful appeal based upon the premise that the substantive effect of the suppression order was a dismissal of the charges, the charges are dismissed as well.

JAMES CURWOOD WITT JR., JUDGE